TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 111

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

FRANCES G. LEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

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1 [Caption omitted.]

Before United States Board of Tax Appeals

Docket No. 65705

FRANCES G. LEE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:

For petitioner: Hugh W. McCulloch, Esq.
For respondent: Harold Allen, Esq.

Docket entries

1932

May 6—Petition received and filed. Taxpayer notified. (Fee paid.)
May 6—Copy of petition served on general counsel.
June 10—Answer filed by general counsel.
July 23—Copy of answer served on taxpayer—general calendar.

1933

Aug. 30—Hearing set Oct. 31, 1933.
2 Sept. 13—Motion for circuit hearing at Chicago filed by taxpayer.
9/14/33 denied.
Oct. 31—Hearing had before Mr. Chas. P. Smith, division 5. Submitted on merits. Stipulation of facts (1) filed.
Nov. 14—Transcript of hearing Oct. 31, 1933, filed.

1934

Feb. 20—Memorandum opinion rendered—Charles P. Smith, division 5. Judgment will be entered under rule 50.
Mar. 14—Notice of settlement filed by general counsel.
Mar. 17—Hearing set April 4, 1934.
Mar. 22—Consent to settlement filed by taxpayer.
Mar. 29—Decision entered—Charles P. Smith, division 5.
June 6—Petition for review by U. S. Circuit Court of Appeals, 1st Circuit, with assignments of error filed by taxpayer.
June 6—Praecipe filed.
June 9—Proof of service of petition and praecipe filed by taxpayer.
June 21—Agreed statement of evidence lodged.
July 3—Supplemental praecipe filed by taxpayer.
July 7—Proof of service of supplemental praecipe filed.
July 26—Supplemental praecipe filed by taxpayer—proof of service thereon.
Aug. 4—Order that time for transmission and delivery of record *sur* petition for review be extended to Sept. 15, 1934, entered.

Before United States Board of Tax Appeals

Petition

Filed May 6, 1932

Frances G. Lee hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:AR:B-1, JHC-60D, dated March 11, 1932, and as a basis for her appeal sets forth the following:

(a) The petitioner is a widow with no dependents, her residence is at Littleton, New Hampshire, and her business address is in care of R. M. Johnson, 606 South Michigan Avenue, Chicago, Illinois. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A", was mailed to the taxpayer on March 11, 1932. The tax in controversy is individual income tax for the year 1929 and is in the amount of forty thousand and eight hundred nineteen dollars and fifty-five cents ($40,819.55).

(b) The determination of tax set forth in said notice of deficiency is based upon the following errors:

1. The Commissioner has erroneously included in the net income of the petitioner subject to normal tax and surtax the sum of three hundred seventy-seven thousand, eight hundred sixty-six dollars and twelve cents ($377,886.12), the profit arising on the sale by the petitioner of 6,448 shares of stock of International Harvester Company and 300 rights to subscribe to shares of stock of the Commonwealth Edison Company which were "capital assets", the sale of which resulted in "capital gain" as defined in the Revenue Act of 1928.

2. The Commissioner has erroneously excluded from the amount of "capital net gain" of the petitioner subject to tax in the year 1929 said sum of three hundred seventy-seven thousand eight hundred sixty-six dollars and twelve cents ($377,866.12), the profit arising by reason of the sale of said securities enumerated above.

3. The Commissioner has erroneously held that said 6,448 shares of stock of International Harvester Company and 300 rights to subscribe to shares of stock of Commonwealth Edison Company sold by the petitioner in 1929 were not "capital assets."

(c) The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

1. On September 4, 1926, George B. Glessner, a resident of Littleton, New Hampshire, died, leaving a last will and testament which was duly admitted to probate. Under the provisions of the will of said decedent, the residue of his estate was given to your petitioner, Frances G. Lee, and as a portion of the residue of the estate of said George B. Glessner, your petitioner became the
4 owner of 1,550 shares of stock of the International Harvester Company, of the par value of $100 per share, and 300 shares of stock of the Commonwealth Edison Company; under the provi-

sions of the laws of New Hampshire, the title to said stock vested in your petitioner and she became the owner thereof on September 4, 1926. After September 4, 1926, by reason of the payment of stock dividends and the exchange of said stock of the International Harvester Company of $100 par value for stock of said company having no par value, the petitioner, as the owner of said 1,550 shares of stock of International Harvester Company of the par value of $100 per share, received 6,448 shares of the common stock of International Harvester Company having no par value.

2. Your petitioner sold said 6,448 shares of common stock of said International Harvester Company of no par value on the dates and for the net amounts hereafter set forth:

January 4, 1929, 948 shares	$93,787.38
January 25, 1929, 2,500 shares	248,985.00
March 5, 1929, 1,000 shares	110,710.00
September 3, 1929, 2,000 shares	273,195.00
Total net sale price, 6,448 shares	726,677.38

The basis for determining the gain arising upon the sale of said 6,448 shares of common stock of International Harvester Company is the market value of said stock on October 6, 1927, the date of the distribution of said stock to the petitioner, and that said market value of said stock on that date was $228.5625 per share for the 1,550 shares acquired by the petitioner under the will of said George B. Glessner, making the total value of the stock of International Harvester Company sold by the petitioner in 1929 the sum of three hundred fifty-four thousand two hundred seventy-one dollars and eighty-eight cents ($354,271.88), and the capital net gain arising from the sale of said stock is in the sum of three hundred seventy-two thousand four hundred five dollars and fifty cents ($372,405.50).

3. Your petitioner, as the owner of said 300 shares of stock
5 of Commonwealth Edison Company received by her under the provisions of the will of George B. Glessner, received on September 30, 1929, rights to subscribe to additional stock of said company, which were sold by your petitioner forthwith for the sum of nine thousand four hundred two dollars and eighteen cents ($9,402.18); that the basis for determining the gain arising upon the sale of said rights to purchase stock of the Commonwealth Edison Company was the market value of said stock on October 6, 1927, the date of the distribution of said stock to your petitioner. The market value of said stock on that date was one hundred sixty-three dollars ($163) a share, or a total of forty-eight thousand nine hundred dollars ($48,900); that the proper allocation of value of said rights issued on September 30, 1929, is 8.060453 percent of the value of said stock, and accordingly said rights should be valued in the sum of three thousand nine hundred forty-one dollars and fifty-six cents ($3,941.56) and the capital net gain arising from the sale of said rights is in the sum of five thousand four hundred sixty dollars and sixty-two cents ($5,460.62).

4.

The total net income of the petitioner for the year 1929 from all sources, including capital net gain, was	$655,570.70	
The capital net gain of the petitioner for the year 1929 included above, which the Commissioner concedes should be considered as capital net gain, was	222,828.68	
The capital net gain of the petitioner for the year 1929 included above in the total of the net income from all sources, arising from the sale of the stock of International Harvester Company referred to above, was	273,405.50	
And from the sale of rights of Commonwealth Edison Company, referred to above, was	5,460.62	
The total capital net gain of the petitioner in 1929 was		$600,694.80
The total net income of the petitioner in 1929 subject to surtax, was		54,875.90
The total amount of dividends received by the petitioner in 1929	$88,566.02	
The personal exemption was	1,500.00	
		90,066.02
		0
The balance of income subject to normal tax was		
Surtax on $54,875.90	3,642.63	
Tax at 12½ percent on capital net gain of $600,694.80	75,086.85	
Total tax		78,729.48
Less:		
Credit for earned income	4.38	
Income tax paid at source	73.80	
		78.18
Total tax assessable		78,651.30

5.

Your petitioner has paid, on account of income tax for the year 1929 believed to be due, the sum of	84,947.00
The total tax assessable as shown above is	78,651.30
Total amount of refund now due to the petitioner	6,295.70

Wherefore, your petitioner prays that this Board may hear the proceedings and determine that there is no deficiency of income tax due from the petitioner for the year 1929 and may determine that the petitioner is entitled to a refund of six thousand two hundred ninety-five dollars and seventy cents ($6,295.70) and interest thereon, the amount of overpayment made by your petitioner, upon the filing of said return.

FRANCES G. LEE.

7 Counsel:

HUGH W. MCCULLOCH,

857–231 South LaSalle Street, Chicago, Illinois.

[*Duly sworn to by Frances G. Lee, jurat omitted in printing.*]

Exhibit A to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Mar. 11, 1932.

MRS. FRANCES G. LEE,
(c/o R. M. Johnson),
606 South Michigan Avenue, Chicago, Illinois.

MADAM: You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $34,523.85, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges,
8 since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assesment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. WILMER,
Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.

STATEMENT

IT:AR:B-1 JHC-60D

In re: Mrs. Frances G. Lee, c/o R. M. Johnson, 606 South Michigan Avenue, Chicago, Illinois

Tax liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$119,470.85	$84,947.00	$34,523.85

The deficiency shown herein is based upon the report dated November 4, 1931, prepared by Revenue Agent Rush F. Vass and transmitted to you under date of November 20, 1931.

Careful consideration has been accorded your protest dated November 27, 1931, in connection with the findings of the examining officer and the information submitted at a conference held in the office of the internal revenue agent in charge.

Your claim for refund of $6,253.03 has been considered in the adjustment of your return and will be rejected on a schedule to be approved by the Commissioner.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1929, the Income Tax Unit will be unable to afford you an opportunity to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

You are advised that the power of attorney on file in this
9 office does not specifically authorize Mr. Johnson to execute a consent or waiver under the provisions of section 276(b) of the Revenue Act of 1928 extending the period within which a final notice of deficiency may be issued. In the absence of such authority this office is unable to accept the consent filed in your behalf.

Before United States Board of Tax Appeals

Answer

Filed July 10, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(a) Admits the allegations contained in paragraph (a) of the petition.

(b) Denies that the Commissioner of Internal Revenue erred in manner and form as alleged in paragraph (b), subparagraphs 1, 2, and 3, of the petition.

(c) Denies the allegations contained in paragraph (c), subparagraphs 1 to 5, inclusive, of the petition.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's petition be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
PREW SAVOY,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Stipulation as to facts

Filed October 31, 1933

It is stipulated and agreed by and between the parties hereto that the following facts may be considered upon the hearing of the above entitled cause without further proof of the same:

10 Frances G. Lee, the petitioner in the above-entitled cause, is a widow, with no dependents. Her residence is at Littleton, New Hampshire, and her business address is in care of R. M. Johnson, 606 South Michigan Avenue, Chicago, Illinois.

On September 4, 1926, George B. Glessner, a resident of Littleton, New Hampshire, died, leaving a last will and testament and codicil thereto, which were duly admitted to probate, and the following is a true and correct copy of said last will and testament and codicil thereto of George B. Glessner:

"I, George B. Glessner, a citizen of the State of New Hampshire, residing in the town of Bethlehem in Grafton County, in said State, do hereby make and publish the following as my last will and testament:

"ITEM 1. I give and bequeath to the Springfield Cemetery of Springfield, Ohio, the sum of one thousand dollars, the same to be held and controlled by the said cemetery, together with other funds held by it for the purpose of its upkeep, and the income derived from the same shall be expended in keeping my lot in said cemetery in good order, any excess not needed for that purpose to be expended in the general upkeep of the said cemetery. No separate investment or accounting for said fund shall be required of said cemetery.

"ITEM 2. I do hereby give and bequeath the sum of twenty-five thousand dollars to the Clark Memorial Home for Aged Women in the city of Springfield, Ohio; the said sum to be held, controlled, and invested by the board of trustees of the said Clark Memorial Home in such securities as are permitted by the law of Ohio to be invested in by trustees. The principal of said fund shall at all times be kept intact and be known as the 'George B. Glessner Fund', the income derived therefrom to be used towards the general support of the said home, in the discretion of the board of trustees.

"ITEM 3. I give and bequeath to Mrs. Jennie Russi, of Zanesville, Ohio, the sum of one thousand dollars in recognition

11 of her faithful care of my mother and father during their last years. In case she does not survive me, then I give the said sum to her deceased sister's son, Fred, whom she has reared, in case he survives me.

"ITEM 4. I give and bequeath to my niece, Mamie Reeder, now in Florence, Italy, and to my niece Nellie R. Blandy, wife of J. Ernest

Blandy, of Funchal, Madeira, each the sum of ten thousand dollars; and should either of said nieces die before me, leaving lawful issue then surviving, the sum so given to her shall be taken by her issue; but in case of the death of either or both of them before me, without issue surviving me, the sum so given to the one so dying shall become part of my residuary estate. Either or both of the legacies given in this item may be paid in cash or in bonds of a State or National Government or subdivision thereof, at the appraised value thereof, and acceptable to the legatee.

"ITEM 5. I give and bequeath unto Martha W. Glessner, the widow of my brother, W. L. Glessner, in case she survives me, the sum of sixty thousand dollars, and I give and bequeath unto his daughter Mary G. Paull the sum of one hundred thousand dollars; and in case said Mary G. Paull should die before me, leaving lawful issue then surviving, the said legacy given to her shall be taken by her issue per stirpe. Either of the legacies in this item may be paid in cash or in assets, preferably stocks or bonds of Wheeling, West Virginia, corporations, at the appraised value thereof, and acceptable to the legatee.

"ITEM 6. I give and bequeath to my nephew, J. G. M. Glessner, and to each of my two nieces of my own blood, namely: Frances G. Lee and Mary G. Paull, the sum of twenty-five thousand dollars. In the event of the death of such nephew or of either of said nieces before me, leaving issue surviving him or her, then the said legacy bequeathed to such nephew or niece so dying shall be taken by his or her surviving lawful issue to be distributed among such issue share and share alike per stirpe and not per capita.

12 "Any of the legacies mentioned in this item may be paid in cash or in stocks or securities at the appraised value thereof acceptable to the legatee.

"ITEM 7. I give and bequeath to my sister, Jessie G. Chandler, of Zanesville, Ohio, should she survive me, the sum of twenty-five thousand dollars to be paid in same manner as provided in item 6 preceding.

"ITEM 8. I give and bequeath unto my brother, John G. Glessner, the sum of four hundred thousand dollars in cash or the same to be accepted by him on the following conditions, namely: That he shall pay to my sister, Jessie G. Chandler, of Zanesville, Ohio, the sum of ten thousand dollars per annum during her natural life, payable at least as often as in semiannual installments. The period to be covered by said payments to begin at the time of my decease, and the payment for the last year of the life of said Jessie G. Chandler to be proportioned; and the said bequest to my said brother, John J. Glessner, is upon this further condition, that at the death of said Jessie G. Chandler he pay over one-half of the principal of said fund to his then living children in equal shares, the issue then living of a deceased child of his to take the parent's share.

"ITEM 9. I give, devise, and bequeath all the rest, residue, and remainder of my estate wherever situated, whether now owned or

hereafter acquired, including all property the subject of prior disposition herein which for any reason shall fail, be defeated, or prove ineffectual, to the children of my brother, John J. Glessner, share and share alike, the issue of any deceased child of his to take the parents share per stirpe.

"I hereby direct that all of my debts, funeral expenses, and costs of administration be paid out of the said residue, and that there also be paid out of the same any State or national inheritance taxes of the United States that may be required to be paid upon any of the legacies hereinbefore given, so as to protect the legatee in each instance against the payment of such legacy or inheritance taxes.

13 "ITEM 10. I hereby nominate and appoint my brother, John J. Glessner, and my nephew, J. G. M. Glessner, or the survivor of them, the executors or executor of this my will, and direct that no bond be required of either of them as such executor.

"I do hereby give to my said executors or to the survivor of them, full authority to settle, adjust, and compromise any matters or claims arising in connection with the settlement of my estate, and full power to sell at public or private sale upon such terms as they think proper, any of the assets of my estate in order promptly to settle the same satisfactorily to the parties interested therein.

"Hereby revoking all former wills made by me, I have in witness of the foregoing hereunto subscribed my name at Springfield, Ohio, this 19th day of June, 1917.

"G. B. GLESSNER.

"Signed and acknowledged as his last will and testament by the said George B. Glessner in our presence, and by us signed as witnesses thereto in his presence and at his request and in the presence of each other, this June 19th, 1917.

"J. E. BOWMAN.
"E. O. BOWMAN.

"Codicil to my last will and testament

"ITEM 1. I give and bequeath to my two good friends, Mrs. H. H. Bean and Chase Stewart, each the sum of ten thousand dollars, should either of them survive me; but in case of the death of either, or both, of them, before me, the sum so given to the one so dying shall become part of my residuary estate, and I desire these amounts to be paid in full free of any State and national inheritance taxes that may be required to be paid upon legacies same as provided in second paragraph of item 9, of my original will.

"Witness my signature this 5th day of June, 1919.

"G. B. GLESSNER.

14 "Witnesses:
"GEO. W. WINGER,
"HARLEM C. WEST."

Said Frances G. Lee is a child of John J. Glessner, a brother of said George B. Glessner, and was one of the beneficiaries named in item 9 of the will of said decedent.

That as a portion of the residue of the estate of said George B. Glessner passing under the provisions of item 9 of the will of said decedent, there was distributed to said Frances G. Lee 1,550 shares of the stock of International Harvester Company, of the par value of $100 per share, and 300 shares of stock of the Commonwealth Edison Company owned by said decedent at the time of his death. That the final account of the executor of the estate of said George B. Glessner, in which the distribution of said stock of International Harvester Company and Commonwealth Edison Company to said Frances G. Lee was shown, was filed and approved in the probate court of the county of Grafton and State of New Hampshire, on October 3, 1927, and said stock of the International Harvester Company and Commonwealth Edison Company was delivered to said Frances G. Lee by said executor on October 6, 1927; that on October 6, 1927, the date of the distribution of said stock of International Harvester Company and Commonwealth Edison Company to said Frances G. Lee, said common stock of International Harvester Company had a value of $228.5625 per share, and the total of 1,550 shares of common stock of International Harvester Company received by her had a value on that date of $354,271.88, and said stock of Commonwealth Edison Company had a market value of $163 a share, and said 300 shares of stock of Commonwealth Edison Company received by her had a total value on that date of $48,900.

That in 1928 said Frances G. Lee exchanged said 1,550 shares of common stock of International Harvester Company having a par value of $100.00 per share, solely for 6,200 shares of common stock of said company having no par value; that thereafter in 1928 said Frances G. Lee received 248 shares of the common stock of International Harvester Company having no par value as a stock dividend upon said 6,200 shares of common stock of said company.

That said Frances G. Lee said 6,448 shares of common stock of said International Harvester Company of no par value on the dates and for the amounts hereinafter set forth:

January 4, 1929, 948 shares	$90,787.38
January 25, 1929, 2,500 shares	248,985.00
March 5, 1929, 1,000 shares	110,710.00
September 3, 1929, 2,000 shares	273,195.00
Total net sale price, 6,448 shares	725,677.38

That on September 30, 1929, said Frances G. Lee, as the owner of said 300 shares of stock of Commonwealth Edison Company received by her under the provisions of the will of George B. Glessner, received rights to subscribe to additional stock of said company, which were sold by her forthwith for the sum of $9,402.18; that the

proper allocation of value of said rights issued on September 30, 1929, is 8.060453 percent of the value of said stock.

That the net income of said Frances G. Lee for the year 1929 from all sources, including capital net gain, was $655,570.70; that the capital net gain of said Frances G. Lee for the year 1929 included in the above total of $655,570.70 which the Commissioner concedes should be considered as capital net gain, is $222,828.68.

That the gain arising from the sale of said common stock of International Harvester Company referred to above was $372,405.50; that the gain from the sale of the rights of Commonwealth Edison Company referred to above was $5,460.62.

HUGH W. MCCULLOCH,
Counsel for Petitioner Frances G. Lee.
E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

16 Before United States Board of Tax Appeals

Docket No. 65705

FRANCES G. LEE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Hugh W. McCulloch, Esq., for the petitioner; Harold Allen, Esq., for the respondent.

Memorandum opinion

Entered February 20, 1934

SMITH: This is a proceeding for the redetermination of a deficiency in income tax for 1929 of $34,523.85. The only question in issue in this proceeding is whether the gain derived by the petitioner upon the sale of certain securities distributed to her from the residue of her deceased uncle's estate is taxable as capital net gain under the provisions of section 101 of the Revenue Act of 1928, the securities in question having been sold by the petitioner within a period of less than two years from the date of their distribution to her but after more than two years from the date of the decedent's death. There is no dispute as to the proper basis for computing the profits on the sale of the securities, or the amount of such profits.

The parties have filed a written stipulation of facts from which it appears that the petitioner was made one of the residuary legatees of the estate of her deceased uncle, who died on September 4, 1926. On October 6, 1927, the executor of the decedent's estate distributed to the petitioner, out of the residue of the estate, 1,550 shares of International Harvester Company and 300 shares of the Commonwealth Edison Company. Such distribution was approved

by the probate court of the county of Grafton, New Hampshire, on October 3, 1927. At the date of distribution the International Harvester Company stock had a value of $228.5625 per share, or a total value of $354,271.88 for the 1,550 shares, and the Commonwealth Edison Company stock had a value of $163 per share or a total value of $48,900 for the 300 shares.

17 In 1928 the petitioner exchanged the 1,550 shares of International Harvester Company stock, having a par value of $100 per share, for 6,200 shares of the company's common stock of no par value. Thereafter, in 1928, she received 248 shares of the no par value common stock as a stock dividend upon the 6,200 shares held by her. Thereafter, and during 1929, the petitioner sold all of her shares of the International Harvester Company no par value stock as follows:

January 4, 1929, 948 shares	$303,787.38
January 25, 1929, 2,500 shares	248,985.00
March 5, 1929, 1,000 shares	110,710.00
September 3, 1929, 2,000 shares	273,195.00
Total net sale price, 6,448 shares	726,677.38

On September 30, 1929, the petitioner, as owner of 300 shares of the stock of the Commonwealth Edison Company, received the rights to subscribe for additional shares of stock, which subscription rights were immediately sold by her for the amount of $9,402.18. The proper allocation of value of the subscription rights is 8.060453 percent of the value of the stock.

The petitioner's net income from all sources for the taxable year 1929, including capital net gain of $222,828.68, was $655,570.70.

The petitioner's gain from the sale of the International Harvester Company common stock referred to above was $372,405.50. The petitioner's gain from the sale of the stock subscription rights of Commonwealth Edison Company referred to above was $5,460.62.

The question here presented for our determination is controlled by the Board's decisions in Nancy K. McFeely, 29 B. T. A. —, promulgated February 2, 1934, and Isabel K. Dibblee, 29 B. T. A. —, promulgated February 13, 1934. We held in those cases that the date of distribution of securities to the legatee or devisee determines the beginning of the period for which they shall be deemed to have

18 been held by such distributee for the purpose of determining the applicability of section 101 of the Revenue Act of 1928. Upon authority of those cases we hold that the securities in question were not held by the petitioner for more than two years within the meaning of section 101 (c) (8) and that the petitioner is not entitled to report the profits from the sale of the securities in question as capital net gain.

Judgment will be entered under rule 50.

Before the United States Board of Tax Appeals

Decision

Entered March 29, 1934

Pursuant to memorandum opinion of the Board entered on February 20, 1934, the respondent herein having on March 14, 1934, filed a notice of settlement and proposed recomputation and the petitioner having on March 22, 1934, filed an acquiescence in the computation as made by the respondent, now therefore, it is

Ordered and decided: That there is a deficiency in income tax for the year 1929 in the amount of $34,523.85.

CHARLES P. SMITH, *Member.*

In United States Circuit Court of Appeals

Petition for review of decision of the United States Board of Tax Appeals

Filed June 6, 1934

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Your petitioner, Frances G. Lee, respectfully petitions for a review by the United States Circuit Court of Appeals for the First Circuit of the decision of the United States Board of Tax Appeals, rendered on the 29th day of March 1934 pursuant to findings of fact in the opinion promulgated on February 20, 1934, in the case of Frances G. Lee, petitioner, v. Commissioner of Internal Revenue, respondent, Board of Tax Appeals Docket No. 65705, wherein the Board affirmed the determination of the Commissioner of Internal Revenue
19 of a deficiency in income tax against the petitioner for the year 1929 in the sum of $34,523.85, and in support of this petition, the petitioner shows this honorable court as follows:

I. STATEMENT OF THE NATURE OF THE CONTROVERSY

The issue raised in this proceeding is whether the gains received by the petitioner in the year 1929 upon the sale of stock of the International Harvester Company in the sum of $372,405.50 and upon the sale of stock subscription rights of Commonwealth Edison Company in the sum of $5,460.62 should be considered, as contended by the petitioner, "capital net gain" as defined in section 101 of the Revenue Act of 1928.

On September 4, 1926, George B. Glessner, a resident of Littleton, New Hampshire, died, leaving a last will and testament which was duly admitted to probate. Under the provisions of the will of said decedent the residue of his estate was given to the petitioner,

Frances G. Lee, and others, and as a portion of the residue of the estate of said George B. Glessner, said Frances G. Lee became the owner of 1,550 shares of stock of the International Harvester Company of the par value of $100 per share and 300 shares of stock of the Commonwealth Edison Company.

On October 6, 1927, the executor of the estate of George B. Glessner distributed to said Frances G. Lee said 1,550 shares of stock of the International Harvester Company of the par value of $100 per share, and said 300 shares of stock of the Commonwealth Edison Company, such distribution being approved by the probate court of the county of Grafton, New Hampshire, on October 3, 1927. At the date of distribution said stock of International Harvester Company had a value of $228.5625 per share and a total value of $354,271.88, and said stock of the Commonwealth Edison Company had a value of $163 per share and a total value of $48,900.

In the year 1928, by reason of the payment of stock dividends and the exchange of said stock of the International Harvester Company of $100 par value for stock of said company having no par value, said Frances G. Lee, as the owner of said 1,550 shares of stock of International Harvester Company of the par value of $100 per share, received 6,448 shares of the common stock of International Harvester Company having no par value.

Frances G. Lee sold said 6,448 shares of said common stock of said International Harvester Company of no par value during the year 1929 for the sum of $726,677.38 and the gain arising from the sale of said stock was in the sum of $372,405.50.

Frances G. Lee, as the owner of said 300 shares of stock of Commonwealth Edison Company, on September 30, 1929, received the right to subscribe for additional shares of stock, which subscription rights were immediately sold by her for the sum of $9,402.18. The proper allocation of value of said rights is 8.060453 percent of the value of said stock and the gain arising from the sale of said rights is in the sum of $5,460.62.

The total net income of the petitioner for the year 1929 from all sources, including capital net gain, was		$855,570.70
The capital net gain of the petitioner for the year 1929 included above, which the Commissioner concedes should be considered as capital net gain, was	$222,828.68	
The net gain of the petitioner for the year 1929 included above in the total of the net income from all sources, arising from the sale of the stock of International Harvester Company referred to above was	372,405.50	
And from the sale of rights of Commonwealth Edison Company referred to above was	5,460.62	
The total capital net gain of the petitioner in 1929, if the net gain from the sale of said stock in International Harvester Company and Commonwealth Edison Company should be included therein, was		600,694.80

The total net income of the petitioner in 1929 subject to surtax, if the net gain from the sale of said stock of International Harvester Company and Commonwealth Edison Company is excluded therefrom was		$54,875.90
The total amount of dividends received by the petitioner in 1929 was	$88,566.02	
The personal exemption was	1,500.00	
		90,066.02
The balance of income subject to normal tax was		0
Surtax on $54,875.90 was	3,642.63	
Tax at 12½ percent on capital net gain of $600,694.80 was	75,086.85	
Total tax should be		78,729.48
Less: Credit for earned income	4.38	78.18
Income tax paid at source	73.80	78.18
Total tax assessable, as contended by the petitioner		78,651.30
Your petitioner has paid, on account of income tax for the year 1929 believed to be due, the sum of		84,947.00
The total tax assessable as shown above is		78,651.30
Total amount of refund now due to the petitioner is therefore		6,295.70

Said Frances G. Lee filed her income-tax return for the year 1929 and included therein the items of income as set forth above and paid tax thereon as set forth above. The Commissioner of
22 Internal Revenue reviewed said return and excluded from the amount of "capital net gain" of the petitioner subject to tax in the year 1929 the gain received upon the sale of said stock of International Harvester Company and upon the sale of the rights of the Commonwealth Edison Company the total sum of $377,866.12.

The petitioner appealed from the determination of the Commissioner of Internal Revenue in proceedings before the Board of Tax Appeals, Docket No. 65705.

After the hearing upon said petition, the Board promulgated its decision in said cause on February 20, 1934, wherein it sustained the contentions of the Commissioner and held that said stock of International Harvester Company and Commonwealth Edison Company sold by the petitioner in 1929 was not held by the petitioner for more than two years prior to the date of the sale, within the meaning of section 101 of the Revenue Act of 1928, and further held that the petitioner was not entitled to report the profits from the sale of said securities as capital net gain. Thereafter, on March 29, 1934, the Board entered a final order of redetermination, finding a deficiency in income tax of $34,523.85 for the year 1929.

II. Designation of Court of Review

The petitioner resides at Littleton, New Hampshire, and her income-tax return for the year 1929 was filed in the office of the collector of internal revenue at Portsmouth, New Hampshire. The petitioner, being aggrieved by said findings of fact, opinion, decision,

and order, desires a review thereof in accordance with the provisions of the Revenue Act of 1928 by the United States Circuit Court of Appeals for the First Circuit.

III. Assignments of Error

The petitioner, as a basis for review, makes the following assignments of error:

1. The United States Board of Tax Appeals erred in determining that the date of distribution of securities to the legatee
23 or devisee determines the beginning of the period for which they shall be deemed to have been held by such distributee for the purpose of determining the applicability of section 101 of the Revenue Act of 1928.

2. The United States Board of Tax Appeals erred in determining that the petitioner did not hold said stock of International Harvester Company sold by her in 1929 from September 4, 1926, the date of the death of said George B. Glessner.

3. The United States Board of Tax Appeals erred in determining that the petitioner did not hold said stock of Commonwealth Edison Company sold by her in 1929 from September 4, 1926, the date of the death of said George B. Glessner.

4. The United States Board of Tax Appeals erred in approving the determination of the Commissioner of the deficiency in income tax for the year 1929 in the sum of $34,523.85.

5. The United States Board of Tax Appeals erred in not sustaining the contentions of the petitioner and in not finding that the petitioner was entitled to a refund of $6,295.70 and interest thereon, the amount of overpayment of tax made by the petitioner upon the filing of said return.

Wherefore, your petitioner prays that this honorable court may review said findings, decision, opinion, and order, and reverse and set aside the same, and for such other and further relief as the court may deem proper in the premises.

Frances G. Lee.

Hugh W. McCulloch,
Frank H. McCulloch,
Attorneys for Petitioner.

[*Duly sworn to by Frances G. Lee, jurat omitted in printing.*]

24 Before United States Board of Tax Appeals

Praecipe for record

Filed June 6, 1934

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, certify, and transmit to the clerk of the United States Circuit Court of Appeals for the First Circuit, with

reference to the petition for review of the final order and decision of the Board in the proceedings before said Board, No. 65705, heretofore filed by the petitioner in the above-entitled cause, a transcript and record in the above cause prepared and transmitted as required by law and the rules of said court, and include in said transcript of record the following documents or certified copies thereof:

(1) The docket entries of all proceedings before the Board of Tax Appeals;

(2) Pleadings before the Board of Tax Appeals as follows:

(a) Petition for redetermination;

(b) Answer of the respondent;

(3) Memorandum opinion of the Board of Tax Appeals;

(4) The decision of the Board of Tax Appeals;

(5) The petition for review filed by the petitioner in the above cause; and

(6) Praecipe for record.

HUGH W. McCULLOCH,
FRANK H. McCULLOCH,
Attorneys for Frances G. Lee, Petitioner.

Before United States Board of Tax Appeals

Supplemental praecipe for record

Filed July 26, 1934

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, certify and transmit to the clerk of
25 the United States Circuit Court of Appeals for the First Circuit, with reference to the petition for review of the final order and decision of the Board in the proceedings before said Board, No. 65705, heretofore filed by the petitioner in the above-entitled cause, a transcript and record in the above cause prepared and transmitted as required by law and the rules of said court, and include in said transcript of record, in addition to the documents enumerated in the praecipe for record heretofore filed in the above-entitled cause, the following:

(1) Stipulated facts; and

(2) Supplemental praecipe for record.

HUGH W. McCULLOCH,
FRANK H. McCULLOCH,
Attorneys for Frances G. Lee, Petitioner.

[Clerk's certificate to foregoing transcript omitted in printing.]

[Memorandum: An order of enlargement of time for docketing case to, and including, September 15, 1934, is here omitted. A. I. Charron, Clerk.]

26 [Minute entry of hearing, Jan. 8, 1935, omitted in printing.]

27 In United States Circuit Court of Appeals for the First Circuit

October term, 1934

No. 2956

FRANCES G. LEE, PETITIONER FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

Appeal from Board of Tax Appeals

Before BINGHAM, WILSON, AND MORTON, JJ.

Opinion of the court

March 9, 1935

WILSON, *J.:* This is a petition for review of a decision of the Board of Tax Appeals. The main issue is the same as that involved in the case of First National Bank of Boston et al. v. United States, decided by this court on March 9, 1935. There was a sale of securities by a residuary legatee in 1929, more than two years after the death of the testator, but less than two years from the date of distribution. The Commissioner assessed the gain in accordance with sec. 113 (a) (5) of the Revenue Act of 1928, but held it was not a capital gain, which was affirmed by the Board of Tax Appeals. Since the acquisition of the securities sold dates back to the death of the testator, Brewster v. Gage, 280 U. S. 327; Chandler v. Field, 63 Fed. (2d) 13, 15; certiorari denied, 289 U. S. 758; Walker v. Hill, 73 N. H. 254; Sanborn v. Clough, 64 N. H. 315, they were held more than two years and should be treated in assessing the tax as a capital gain, although the amount of the gain was properly determined under sec. 113 (a) (5). See First National Bank of Boston, et al. v. United States, supra.

28 As to the sale of the rights in the Commonwealth Edison Company, their acquisition also dates back to the death of the testator, who was the original owner of the stock, out of which the rights arose. It is stipulated that the gain from the sale of the rights was the sum of $5,460.62, based on the value of the stock of the Commonwealth Edison Company on October 6, 1927; but since the date of acquisition of the rights to subscribe to stock dates back to the date of acquisition of the stock, this gain must also be treated as capital gain.

It appears from the petitioner's petition for review that if the above items are capital gain, not only was the deficiency tax assessed by the Commissioner improperly assessed, but that the petitioner was entitled to a refund.

The decision of the Board of Tax Appeals is reversed and the case remanded for further proceedings not inconsistent with this opinion.

In United States Circuit Court of Appeals

Final decree

March 9, 1935

This cause came on to be heard January 8, 1935, upon the record on petition for review of the United States Board of Tax Appeals, and was argued by counsel:

Upon consideration whereof, it is now, to wit, March 9, 1935, here ordered adjudged and decreed as follows: The decision of the Board of Tax Appeals is reversed and the case is remanded for further proceedings not inconsistent with the opinion passed down this day.

By the court,

ARTHUR I. CHAKRON, *Clerk.*

Recital as to issuance of mandate

Thereafter, to wit, on April 9, 1935, mandate issued.

29 [Clerk's certificate to foregoing transcript omitted in printing.]

30 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted and the case is assigned for argument immediately following No. 110.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 39665. U. S. Circuit Court of Appeals, First Circuit. Term No. 111. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Frances G. Lee. Petition for a writ of certiorari and exhibit thereto. Filed June 7, 1935. Term No. 111, O. T., 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935